

**United States Department of Labor
Employees' Compensation Appeals Board**

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T.I., Appellant)	
)	
and)	Docket No. 19-1397
)	Issued: July 7, 2020
DEPARTMENT OF HOMELAND SECURITY,)	
TRANSPORTATION SECURITY)	
ADMINISTRATION, Kahului, HI, Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

On June 11, 2019 appellant filed a timely appeal from a March 18, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards docketed the appeal as No. 19-1397.¹

On June 29, 2016 appellant, then a 43-year-old transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that, on that date, she injured her left upper and lower extremities when she fell down stairs while in the performance of duty. She stopped work that day. OWCP accepted the claim for strain of the fascia and tendon of the posterior muscle group of the left thigh, left shoulder contusion, strain of the fascia and tendon at the shoulder and upper arm level of the left arm, and left hip contusion. It paid appellant wage-loss compensation on the supplemental rolls commencing August 14, 2016.

¹ The Board notes that, following the March 18, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

On December 12, 2016 OWCP referred appellant for a second opinion examination with Dr. Richard Y. Kimura, a Board-certified orthopedic surgeon to assess appellant's employment-related conditions and disability status. In a report dated February 1, 2017, Dr. Kimura reviewed in detail appellant's history of injury and medical treatment. He related appellant's current physical examination findings and noted that the magnetic resonance imaging (MRI) scan of the left shoulder revealed degenerative changes of the glenohumeral joint and acromioclavicular joint and partial tears in the subscapularis supraspinatus, and infraspinatus. Dr. Kimura thereafter opined that the partial tears of the rotator cuff and the calcific tendinitis in appellant's left shoulder could have been caused by her fall. He diagnosed cervical strain, which was superimposed on prior degenerative disc disease and stenosis, and which he explained was probably strained by the bumping during her fall. Dr. Kimura also diagnosed bilateral carpal tunnel syndrome and explained that, while appellant had right wrist symptoms prior to the fall, she did not have left carpal tunnel symptoms until after the fall, therefore her left carpal tunnel syndrome could also have been precipitated by the fall. He opined that appellant was disabled from her date-of-injury position.

By letter dated March 2, 2017, OWCP requested that Dr. Kimura clarify his February 1, 2017 report, to provide definitive evidence establishing that appellant's cervical strain, carpal tunnel syndrome, and partial rotator cuff tears were caused by her fall on June 29, 2016. In a supplemental report dated March 31, 2017, Dr. Kimura explained with regard to the diagnoses of partial rotator cuff tears that "in cases like this you cannot show definitive evidence to show that these problems were caused by the injury you can only go by the presence of symptoms which occurred after the injury." With regard to appellant's cervical strain, aggravation of her preexisting cervical conditions, and left carpal tunnel syndrome, he provided a similar response, noting that appellant had a positive nerve conduction velocity test, which was an objective finding, and that the time relationship of the injury to the subsequent symptoms would lead to these diagnoses. Dr. Kimura also noted that aggravation of appellant's preexisting cervical conditions should have healed in approximately 8 to 10 months, however she had not returned to her preexisting base-line condition. He explained that her current medical restrictions were due to the fall of June 29, 2016.

Appellant returned to modified-duty work effective March 27, 2017. As of May 3, 2017, she claimed compensation for leave without pay (LWOP) for total disability from work. OWCP paid appellant compensation on the supplemental rolls for total disability through June 26, 2017. Appellant returned to work at four hours per day as of June 26, 2017, claiming compensation for four hours per day of LWOP. OWCP paid her compensation on the supplemental rolls for the claimed four hours per day.

As of March 23, 2018, appellant continued to claim compensation for LWOP due to total disability from work through March 2, 2019. OWCP continued to pay appellant compensation on the supplemental rolls for four hours per day, pending development of her claim for the four hours remaining on each claimed day.

By letter dated April 26, 2018, Dr. Jon F. Graham, a neurosurgeon, requested that the acceptance of appellant's traumatic injury claim be expanded to include diagnoses of cervical radiculopathy, and cervical spondylosis without myelopathy or radiculopathy.

By letter dated March 19, 2018, Dr. Diane Nagasaka, a family practitioner, requested that appellant's claim be expanded to include the additional conditions of chronic neck pain and cervical spondylosis without myelopathy. She indicated that recent diagnostics demonstrated severe changes from her traumatic fall at work on June 29, 2016. Appellant continued to treat with Dr. Nagasaka through 2018 and 2019. On August 30, 2018 Dr. Nagasaka requested authorization for cervical surgery.

On January 9, 2019 OWCP forwarded the case record, along with a statement of accepted facts (SOAF), to Dr. Todd Fellars, a Board-certified orthopedic surgeon serving as district medical adviser (DMA), to determine whether appellant's cervical condition arose as a consequence of the accepted work-related injury and whether it had caused total disability since March 2018. It requested that he review specific reports from Dr. Nagasaka, but did not note the February 1, 2017 and March 31, 2017 second opinion reports Dr. Kimura.

In a report dated January 15, 2019, Dr. Fellars reviewed the SOAF and the case record. He opined that it was medically probable that the work event did not cause her radicular symptoms, but that appellant simply had a progression of her degenerative condition. Dr. Fellars further opined that appellant's radicular symptoms and findings of degenerative disc disease were not related to the work incident, as these conditions likely preexisted her fall.

By decision dated March 18, 2019, OWCP denied expansion of the acceptance of appellant's claim to include cervical herniated disc, incomplete tear of the rotator cuff, numbness of the upper extremity, and bilateral spondylosis of the cervical spine with myelopathy. Consequently, it also denied her claim for total disability for the period March 23, 2018 through March 2, 2019, as well as her request for authorization for surgery, as they were based upon the denied conditions. OWCP based its decision on the January 15, 2019 report of Dr. Fellars.

The Board finds that this case is not in posture for decision.

Dr. Fellars was not asked to review the second opinion reports of Dr. Kimura dated February 1 and March 31, 2017, despite the fact that Dr. Kimura had in general terms supported that appellant's cervical conditions, including cervical strain and aggravation of her preexisting cervical conditions; left shoulder conditions including partial rotator cuff tear; and left carpal tunnel syndrome were causally related to appellant's accepted June 29, 2016 employment injury. Dr. Fellars' report of January 15, 2019 contained no reference to this previous medical development on the part of OWCP.

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence to see that justice is done.² Once it undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.³ As Dr. Kimura's

² *S.S.*, Docket No. 18-0397 (issued January 15, 2019); *D.G.*, Docket No. 15-0702 (issued August 27, 2015); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

³ *S.S.*, *id.*; *Richard F. Williams*, 55 ECAB 343, 346 (2004).

second opinion reports were generally supportive of expansion of the acceptance of appellant's claim and found that appellant was disabled due to the accepted employment injury, OWCP should have requested that the DMA also review his reports, prior to denying appellant's request for expansion of her claim, surgical authorization, and additional disability due to conditions Dr. Kimura had opined were causally related to the accepted employment injury.⁴

For this reason, the case will be remanded to OWCP for further development with regard to the issues of expansion, disability, and denial of surgical authorization. After such further development as is deemed necessary, OWCP shall issue a *de novo* decision.

IT IS HEREBY ORDERED THAT the March 18, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this order of the Board.

Issued: July 7, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

⁴ *See id.*